

AMENDED IN SENATE MAY 27, 2005

AMENDED IN SENATE APRIL 4, 2005

SENATE BILL

No. 171

Introduced by Senator Alquist

February 9, 2005

An act to add Section 859.5 to the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

SB 171, as amended, Alquist. Interrogation: recording.

Existing law provides that under specified conditions the statements of witnesses, victims, or perpetrators of specified crimes may be recorded and preserved by means of videotape.

This bill would enact the Truth in Prosecution Act of 2005, which would provide that (1) *except as specified*, any custodial interrogation of an individual *conducted at a place of detention and* relating to a *homicide or a violent felony—offense, as defined*, shall be electronically recorded, *as specified*; (2) the state shall not destroy or alter the electronic recording of a custodial interrogation, except as specified; and (3) if a court finds that a defendant was subjected to an unlawful custodial interrogation, the court shall ~~instruct~~, *at the request of the defendant, provide the jury with a cautionary instruction*, as specified. By imposing these new requirements on local law enforcement when they are interrogating a defendant relating to a *homicide or violent felony—offense*, this bill would impose a state-mandated local program upon local government.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. It is the intent of the Legislature in enacting this
2 act to require the creation of an electronic record of an entire
3 custodial interrogation in order to eliminate disputes in court as
4 to what actually occurred during the interrogation, thereby
5 improving prosecution of the guilty while affording protection to
6 the innocent.

7 SEC. 2. This act shall be known and may be cited as the
8 Truth in Prosecution Act of 2005.

9 SEC. 3. Section 859.5 is added to the Penal Code, to read:

10 859.5. (a) (1) Any custodial interrogation of an individual
11 relating to a ~~felony offense~~ *homicide, as defined in Chapter 1*
12 *(commencing with Section 187) of Title 8 of Part 1, or a violent*
13 *felony, as defined in subdivision (c) of Section 667.5,* shall be
14 electronically recorded, including, but not limited to, the
15 interrogation by a law enforcement officer of an individual
16 suspected of having committed a ~~felony~~ *such an offense.*

17 (2) The state shall not destroy or alter any electronic recording
18 made of a custodial interrogation of a defendant until the time
19 that a defendant's conviction for any offense relating to the
20 interrogation is final and all direct and habeas corpus appeals are
21 exhausted or the prosecution of the defendant for that offense is
22 barred by law.

23 (b) *Any law enforcement officer who conducts a custodial*
24 *interrogation of an individual relating to an offense described in*
25 *subdivision (a) shall be required to make an electronic recording*
26 *of the interrogation pursuant to subdivision (a), unless the law*
27 *enforcement officer can demonstrate, by a preponderance of the*
28 *evidence, either of the following:*

29 (1) *Access to equipment required to electronically record an*
30 *interrogation could not be obtained during the period of time*
31 *that the defendant could be lawfully detained.*

1 (2) *The failure to create an electronic recording of the entire*
2 *custodial interrogation was the result of a malfunction of the*
3 *recording device and obtaining a replacement device was not*
4 *feasible.*

5 (c) If a court finds that a defendant was subjected to a
6 custodial interrogation in violation of subdivision (a), the court
7 shall ~~instruct the jury as follows~~, *at the request of the defendant,*
8 *provide the jury with a cautionary instruction substantially*
9 *similar to the following:*

10 “The law requires a law enforcement officer, when questioning
11 a person who may be charged with a crime, to record all oral
12 statements made to *and made by* that person. The failure of a law
13 enforcement officer to follow this law results in less than a full
14 and accurate record of the actual statement made by the
15 defendant, and denies ~~a~~ *the* defendant the ability to present
16 recorded evidence that may be favorable to his or her case.

17 You have heard evidence that the defendant made a statement
18 to a law enforcement officer. You are the exclusive judge as to
19 whether the defendant made the statement, and as to what was
20 actually said. If you find that the defendant did not make a
21 statement, you must disregard the evidence of the statement and
22 not consider it for any purpose. If you find that the defendant did
23 make a statement, you must view the statement as reported with
24 caution, because unrecorded oral statements made by a defendant
25 out of court to a law enforcement officer should be viewed with
26 caution.

27 You must decide whether or not the defendant in fact made that
28 statement, in whole or in part. The fact that a law enforcement
29 officer did not comply with the law requiring the electronic
30 recording of the reported statement shall be considered by you as
31 a circumstance tending to show that the statement was not made.
32 This failure by the law enforcement officer shall also be
33 considered by you as a circumstance bearing on the weight and
34 credibility to be given to the officer’s account of the statement.”

35 (e)

36 (d) For the purposes of this section, the following terms have
37 the following meanings:

38 (1) “Custodial interrogation” means express questioning, or its
39 functional equivalent, *that is conducted at a place of detention*
40 *that a law enforcement officer should know is reasonably likely*

1 to elicit an incriminating response from the defendant, under
2 circumstances in which the defendant does not feel free to leave
3 or terminate the questioning.

4 (2) “Electronic recording” means a motion picture, videotape,
5 or digital recording that includes both audio and visual
6 representations of any interrogator or defendant involved in a
7 custodial interrogation. *For a violent offense, other than a*
8 *homicide, “electronic recording” may include an audiotape.*

9 (3) “~~Law enforcement official~~ officer” means any officer of
10 the police, sheriff, highway patrol, or district attorney, and any
11 peace officer included in Chapter 4.5 (commencing with Section
12 830).

13 (4) “*Place of detention*” means a police station, correctional
14 facility, holding facility for prisoners, or any other governmental
15 facility in which a person may be held in detention in connection
16 with any criminal charge that has been, or may be, filed against
17 the person.

18 SEC. 4. If the Commission on State Mandates determines that
19 this act contains costs mandated by the state, reimbursement to
20 local agencies and school districts for those costs shall be made
21 pursuant to Part 7 (commencing with Section 17500) of Division
22 4 of Title 2 of the Government Code.